



Comptroller General
of the United States
Washington, D.C. 20548

147398

Decision

Matter of: U.S. Constructors, Inc.; Eletech, Inc.

File: B-248329; B-248605

Date: August 19, 1992

Ronald J. Shaw, Esq., and Theodore M. Bailey, Esq., for U.S. Constructors, Inc., and R. Craig Fry, Esq., Abrahams, Kaslow & Cassman, for Eletech, Inc., the protesters.
C. Dale Duvall, Department of Veterans Affairs, for the agency.

David R. Kohler, Esq., and Donald A. Morrison, Esq., Small Business Administration, for the agency.

Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly found the prices of the only two competing small business firms unreasonably high, canceled the small business set-aside, and resolicited on an unrestricted basis where the small business bids exceeded the bid of a large business by 17 percent and 38 percent, respectively, and the Small Business Administration elected not to appeal the procuring agency's decision to withdraw the set-aside.

DECISION

U.S. Constructors, Inc. and Eletech Inc. protest the Department of Veterans Affairs (VA) cancellation of invitation for bids (IFB) No. 636-45-91, a total small business set-aside,¹ and the agency's subsequent withdrawal of the set-aside and unrestricted resolicitation for the requirement under IFB No. 636-41-92.

We deny the protests.

¹We dismissed Eletech's protest of the IFB cancellation as untimely filed under our Bid Protest Regulations, since it was filed more than 10 working days after Eletech was apprised of the cancellation. 4 C.F.R. § 21.2(a)(1) (1992). Eletech's protest of the resolicitation on an unrestricted basis was timely filed prior to bid opening.

VA issued IFB No. 636-45-91 on August 6, 1991, for replacement of a service elevator at the VA Medical Center, Omaha, Nebraska. The IFB stated that the estimated cost range was between \$250,000 and \$500,000. The undisclosed government estimate was \$266,000.

Three bids were received on the September 13 bid opening date.

Mathews Construction Co.	\$309,485
U.S. Constructors	363,890
Eletech	428,414

VA initially proposed an award to Mathews. However, Eletech timely protested Mathews's small business size status to the Small Business Administration (SBA), which ultimately found Mathews to be other than small because of its affiliation with a large business concern. Consequently, VA rejected Mathews's bid.

The SBA Procurement Center Representative (PCR) reports that VA's contracting officer told him on April 2 that VA believed that the other small business bids exceeded the fair market price, and that VA was considering canceling the IFB, withdrawing the small business set-aside, and resoliciting on an unrestricted basis. Between April 3 and April 9, the PCR attempted to dissuade VA from its contemplated course of action. Notwithstanding the PCR's efforts, on April 6 VA gave the PCR written notice of the planned cancellation and withdrawal of the set-aside. The contracting officer recommended withdrawal of the small business set-aside on the grounds that the second low bid of U.S. Constructors exceeded the fair market price when compared to the low bid and government estimate.² On April 9, the PCR requested that VA reconsider its position, but VA instead canceled the IFB, pursuant to Federal Acquisition Regulation (FAR) § 14.404-1(c)(6) (FAC 90-5), because it considered the prices of all acceptable bids to be unreasonably high. Shortly thereafter, VA withdrew the small business set-aside and announced that an unrestricted IFB would be issued for the work. SBA reports that the PCR, after consulting with other SBA officials, elected not to appeal the withdrawal of the set-aside to the head of VA.

Both U.S. Constructors and Eletech protest the agency's determination to cancel the set-aside and resolicit on an unrestricted basis. An agency may withdraw a set-aside under FAR § 19.503(a) if the award "to a small business concern would be detrimental to public interest (e.g.,

²U.S. Constructors bid was 37 percent higher than the government estimate and Eletech's bid was 61 percent higher.

payment of more than fair market price)." Both protesters contend that VA improperly found their bid prices to be unreasonably high.

An agency's determination of price reasonableness involves the exercise of broad discretion on the part of the contracting officer, which our Office will not question, unless it is clearly unreasonable. Sigma West Corp., B-247916, July 20, 1992, 92-2 CPD ¶ _____. It is proper for an agency to base a price unreasonableness determination upon a comparison with such factors as government estimates, past procurement history, current market conditions, or any other relevant factors, including those which have been revealed by the competition received. FAR §§ 14.407-2, 15.805-2; Sylvan Serv. Corp., B-222482, July 22, 1986, 86-2 CPD ¶ 89.

The protesters argue that VA's determination was unreasonable because it was based on an erroneous government estimate. Our review of the record shows that the VA estimate may be understated; U.S. Constructors has pointed to a number of apparent errors and VA has not refuted these points. Nevertheless, Mathews's bid provides a legitimate benchmark against which the protesters' bids can be compared to determine price reasonableness.

Where the government estimate is found to be of questionable validity, a current competitor's bid price, even if the bid is nonresponsive, can be a significantly better indicator of the market price and, thus, of price reasonableness. See Sigma West Corp., *supra*. In deciding whether to cancel a small business set-aside, an agency may rely upon courtesy bids from otherwise ineligible large business concerns in making price reasonableness determinations.³ See American Imaging Servs., 69 Comp. Gen. 625 (1990), 90-2 CPD ¶ 51. In this case, Mathews's bid was not merely a courtesy bid; Mathews submitted its bid as a small business concern and was found to be a large business by the SBA.⁴ Under the circumstances, the agency could reasonably compare U.S.

³On the other hand, a small business firm's price is not unreasonable merely because it is greater than the price submitted on the IFB of an ineligible large firm; the determination of whether a particular small business price premium is unreasonable depends upon the circumstances of each case. See Western Filter Corp., B-247212, May 11, 1992, 92-1 CPD ¶ 436.

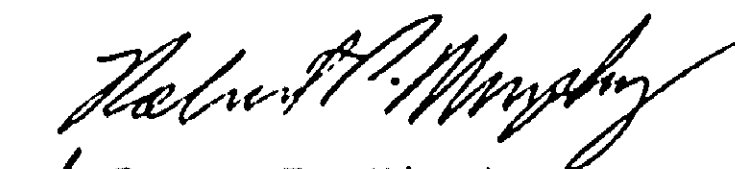
⁴There is no evidence of bad faith in Mathews's self-certification of its small business status.

Constructors's and Eletech's bid prices with Mathews's bid. See Sigma West Corp., supra; Western Filter Corp., supra. Since these bids exceeded the Mathews bid by 17 percent and 38 percent, respectively, we think the VA properly could determine that the protesters' bids on the IFB were unreasonably high and that the set-aside should be withdrawn.⁵

The protesters contend that VA improperly withdrew the set-aside without properly considering the objections of SBA in violation of FAR §§ 19.505, 19.506 and 13 C.F.R. § 125.6(a)(2) (1992). As pointed out by SBA, these regulations require a procuring agency to notify the SBA PCR, where one is assigned, whenever it proposes to cancel a small business set-aside, and provide a mechanism for an SBA appeal to the head of the contracting activity and to the agency head.

In this case, the SBA PCR was notified of VA's intent to withdraw the set-aside, and he voiced his concerns about the proposed withdrawal. When the contracting activity decided to proceed despite these concerns, SBA decided not to appeal to the agency head. Under the circumstances, we find the agency complied with the requisite regulations concerning consultation with SBA. See Flagg Integrated Sys. Tech., B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221.

The protests are denied.


for James F. Hinchman
General Counsel

⁵Eletech also argued that its price was reasonable because it fell well within the project's \$250,000 to \$500,000 cost range. FAR § 36.204 (FAC 90-5) prescribes the cost estimate ranges to be stated in construction solicitations and specifically provides that, for a project of the magnitude contemplated under this IFB, a cost estimate range of \$250,000 to \$500,000 is to be stated. FAR § 36.204(d). The cost range merely establishes the general parameters of the acquisition, and even if an estimated cost range is inaccurately listed in the IFB, it is without effect since bid prices are not limited to the confines of the estimated cost range and bidders are responsible for independently preparing their own bids. RNJ Interstate Corp., B-241946, Feb. 26, 1991, 91-1 CPD ¶ 219; Speer Constr. Co., Inc., B-228339.2, Feb. 10, 1988, 88-1 CPD ¶ 131.